No. 13091

United States Court of Appeals

For the Ninth Circuit

WESTERN BOAT BUILDING COMPANY, a partnership, and UNITED PACIFIC INSURANCE COMPANY, a corporation,
Appellants,

vs.

J. J. O'LEARY, Deputy Commissioner, Fourteenth Compensation District, under the Longshoremen's and Harbor Workers' Compensation Act, and ROBERT MARKOVICH,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

BRIEF OF APPELLANTS

BOGLE, BOGLE & GATES,
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STATEMENT DISCLOSING JURISDICTION

This is an appeal from a final order entered by the United States District Court for the Western District of Washington, Southern Division. This cause was originally instituted by appellants (employer of one Markovich, and its insurance carrier under the Longshoremen's and Harbor Workers' Act) seeking to review and permanently enjoin (Title 33, U.S.C.A. §925) a certain "Compensation Order-Award of Compensation" (Tr. 10-13) made by J. J. O'Leary, Deputy Commissioner under the Longshoremen's and Harbor

Workers' Act, and filed in his office March 20, 1951, awarding appellee Markovich compensation for his injuries.

By the order appealed from, the District Court dismissed appellants' petition for an injunction, from which final order this appeal is taken pursuant to the provisions of Title 33, U.S.C.A. §921 and Title 28, §2107 of the new Federal Judicial Code (effective September 1, 1948).

STATEMENT OF THE CASE

One Robert Markovich, an amphibious worker (Tr. 34) was employed as a fastener by appellant Western Boat Building Company, at its shipyard, in Tacoma, Washington. On October 18, 1950, he fell from the deck of the tug "EL SOL" to the shore or beach below (Tr. 37). The tug had been withdrawn from the navigable waters of Tacoma Harbor by means of a marine railway and was resting on the shore (Tr. 35) at the time of the accident.

The marine railway employed in this operation consisted of a huge wooden cradle, running from the shore into the water (about 150 feet) (Tr. 35) on railroad tracks, which was placed under the keel of the tug, when afloat, and then the cradle, with the tug upon it, were pulled on shore by means of shore winches and the tug beached for repairs (Tr. 56).

Six days after his injury, Markovich filed a claim for compensation with the Department of Labor & Industries of the State of Washington, which state agency administers the Workmen's Compensation Act

of the State of Washington. The claim was allowed November 14, 1950, but further investigated by the State Department, and monthly compensation payments to Markovich began December 15, 1950. Three such monthly awards of compensation in the amount of $75.00 had been paid Markovich by the Department of Labor & Industries, in accordance with the provisions of the Workmen's Compensation Act of the State of Washington, for temporary total disability (Employers Exhibit 4).

Later, and while receiving compensation from the State of Washington, Markovich, on January 10, 1951, filed a claim for compensation benefits with appellee J. J. O'Leary, Deputy Commissioner, under the Longshoremen's and Harbor Worker's Compensation Act. A hearing was held on his claim at Tacoma, Washington, on February 26, 1951 (Tr. 29 to 59), resulting in the entry of an order by appellee Deputy Commissioner, awarding Markovich compensation under the provisions of the Longshoremen's and Harbor Worker's Compensation Act (Tr. 11-12).

Appellants petitioned the district court to enjoin the enforcement of this order, which was denied and appellants' petition dismissed (Tr. 22 to 25) from which this appeal is taken.

SPECIFICATION OF ERRORS

1. The lower court erred in dismissing appellants' petition to restrain the enforcement of the compensation order of the Deputy Commissioner as that order was arbitrary and capricious and not in accordance

with law, since Markovich's injury was subject to the exclusive jurisdiction of the Washington Compensation Act.

2. The lower court erred in not according a *de novo* hearing to appellants on the jurisdictional question of whether Markovich was injured on navigable waters.

ARGUMENT

Summary of Argument on First Assignment of Error

Markovich's injury was not subject to the jurisdiction of the Longshoremen's and Harbor Workers' Compensation Act since (1) it did not occur on navigable waters and (2) compensation for such injury was and could be validly provided by the Compensation Act of the State of Washington.

Status of Industrial Injuries on Navigable Waters Before Act

Numerous state workmen's compensation acts were enacted beginning in 1910. In 1917, the Supreme Court in the case of *Southern Pacific v. Jansen,* 244 U.S. 205, 81 L.ed. 1096, refused to permit the New York Compensation Act to be applied to an injury occurring to a longshoreman on navigable waters since

> "As here applied the Workmen's Compensation Act conflicts with the general maritime law which constitutes an integral part of the Federal law under art. 3, section 2 of the Constitution and to that extent is invalid."

The court stressed the uniformity required by the Constitution in admiralty matters.

In the subsequent case of *Millers Indemnity Under-*

writers v. Braud, 279, U.S. 59, 70 L.ed. 470, involving the death on navigable waters of a diver sawing off submerged piling, the Supreme Court promulgated the doctrine of "local concern" permitting the application of state compensation acts to injuries occurring on navigable waters where

> "the matter is of mere local concern and its regulation by the state will work no material prejudice to any characteristic features of the general maritime law."

In applying this decision the courts were forced to rule on a case-to-case basis as to the relationship of the injured man's occupation to the general maritime law, and permitted the application of state compensation acts to a varied type of industrial injuries, occurring on navigable waters.

Congress sought to eliminate the jurisdictional uncertainties arising from the *Jensen* decision by an amendment enacted October 6, 1917, to the saving clause, Section 3 of §24 of the Judiciary Act of 1789, by giving claimants injured on navigable waters their rights and remedies under any applicable state compensation act.

This provision was held unconstitutional in the case of *Knickerbocker Ice Co. v. Stewart,* 253 U.S. 149, 64 L.ed. 834, as destroying the harmony and uniformity of the admiralty law as contemplated by the Federal constitution.

By a subsequent amendment to Clause 3 of §24 of the Judicial Code (Act of June 10, 1922) state compensation acts were made applicable by Congress to

all injuries occurring on navigable waters except as to masters and members of the crew.

This amendment was similarly declared unconstitutional by the Supreme Court in the case of *Washington v. Dawson & Co.,* 264 U.S. 218, 68 L.ed. 646, for the same reason. In this case the Supreme Court suggested that Congress could lawfully pass a compensation act applicable to injuries occurring on navigable waters which was of general application, but ruled Congress was precluded from delegating this power to the several states as it had attempted to do in the *Knickerbocker* and *Dawson* cases, *supra.*

Congress accepted this judicial hint and passed the Longshoremen's and Harbor Workers' Act (46 U.S. C.A. §901 to §951, inc.) which was approved March 4, 1927.

The Congressional avowal of purpose of the enactment is found in the report of the Senate Committee of the Judiciary, accompanying the bill (S.R. 973, 69th Cong. 1st Session):

> "If longshoremen could avail themselves of the benefit of State Compensation laws, there would be no occasion for this legislation; but, unfortunately they are excluded from these laws by reason of the character of their employment; and they are not only excluded but the Supreme Court has more than once held that Federal legislation can not, constitutionally, be enacted that will apply State laws to this occupation.(* * * Citing cases.) It thus appears there is no way of giving these hard-working men, engaged in a somewhat hazardous employment, the justice involved in the modern

principle of compensation without enacting a uniform compensation statute."

Limitations on Jurisdiction of Longshoremen's and Harbor Workers' Act

The jurisdictional scope or coverage of the Longshoremen's and Harbor Workers' Act is promulgated by 46 U.S.C. §903(a) reading as follows:

> "Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon navigable waters of the United States (including any dry-dock) *and if recovery for the disability or death may not validly be provided by State law"* (Italics ours).

This Act was an exercise of Article III, §2, of the Federal Constitution extending the judicial powers of the United States to:

> "All cases of admiralty and maritime jurisdiction."

In the case of *Crowell v. Benson,* 285 U.S. 22, 76 L.ed. 598, which upheld the constitutionality of this Act, the court said:

> "As the Act relates solely to injuries occurring upon the navigable waters of the United States, it deals with the maritime law, applicable to matters which fall within the admiralty and maritime jurisdiction (Const. Art. 3, Sec. 2); *Nogueira v. New York, N. H. and H. R. Co.,* 281 U.S. 128) and of the general authority of congress to alter or revise the maritime law which shall prevail throughout the country is beyond dispute. In limiting the application of the Act to cases where recovery 'may not validly be provided by State law,' the Congress

> evidently had in view the decisions of this Court with respect to the scope of its national legislature."

Traditionally the jurisdictional test of an admiralty tort is its occurrence upon the navigable waters of the United States. *The Plymouth* (1866) 70 U.S. (3 Wall.) 20; *The Admiral Peoples,* 295 U.S. 649, 19 L.ed. 1633.

Congress sought to substitute for this tort liability occurring on navigable waters, a compensation law of general application to longshoremen and stevedores. It was not attempting to encroach upon or disturb the well settled jurisdiction of state workmen compensation acts to injuries occurring on land nor on navigable waters if "of local concern." It was not attempting to exclusively occupy the field of industrial injuries occurring to amphibious workers, since the Act was only effective provided the injury *could not be validly covered by state workmen's compensation acts* and the Supreme Court, in numerous cases in developing the "local concern" doctrine had sanctioned application of state acts to injuries occurring on navigable waters.

That Congress in passing the Act was merely attempting to bridge the gap between the "local concern" doctrine cases and injuries on navigable waters to longshore or harbor workers and not attempting to narrow or restrict the broad scope or jurisdictional reach of state compensation acts is evident from the observation of the United States Supreme Court in the case of *Swanson v. Marra Brothers,* 328 U.S. 1, 90 L.ed. 1045, where the court said:

"The Senate Judiciary Committee, in recommending the legislation which became the Longshoremen's and Harbor Workers' Compensation Act, expresssed doubt as to the constitutional power of Congress to give recovery to such employees injured on shore, saying 'These men are mainly employed in loading, unloading, refitting, and repairing ships; but it should be remarked that injuries occurring in loading or unloading are not covered unless they occur on the ship or between the wharf and the ship, so as to bring them within the maritime jurisdiction of the United States.' Sen. Rep. No. 973, 69th Cong. 1st Sess. p. 16. CF. *Cleveland Terminal & V. R. Co. v. Cleveland S. S. Co.,* 208 U.S. 316, 52 L.ed. 508, 28 S.Ct. 414, 13 Ann. Cas. 1215, and *The Admiral Peoples,* 295 U.S. 649, 79 L.ed. 1633, 55 S.Ct. 885, both supra."

Congress Did Not Pre-empt Compensation Field by Act

The narrow reach of the Congressional purpose in passing this legislation as evidenced by §903 *supra* was further noted by the Fourth Circuit in the case of *U. S. Casualty v. Taylor,* 64 F.(2d) 521 where the court said:

"Section 903(a) of the act provides: 'Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury, occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State Law.' We are particularly concerned here with so much of this limitation as restricts recovery to those instances where recovery through workmen's compensation proceedings may

not validly be provided by state law.' The significance of this phrase was brought out in *Crowell v. Benson*, 285 U.S. 39, 52 S.Ct. 285, 287, 76 L.ed. 598, where it was said: 'In limiting the application of the act to cases where recovery through workmen's compensation proceedings may not validly be provided by State law, the Congress evidently had in view the decisions of this Court with respect to the scope of the exclusive authority of the national Legislature. The propriety of providing by federal statute for compensation of employees in such cases had been expressly recognized by this Court, and within its sphere the statute was designed to accomplish the same general purpose as the Workmen's Compensation Laws of the States.' The cases referred to as bearing out this interpretation of the language were *Southern Pacific Co. v. Jensen, Knickerbocker Ice Co. v. Steward* and *Washington v. Dawson, supra,* in which the authorized scope of the state compensation statutes were discussed, and it was shown that, in so far as they attempted to deal with cases within the maritime and admiralty jurisdiction, they were unconstitutional.

"We conclude from these pronouncements of the Supreme Court that the federal act is applicable only to workmen engaged in maritime employment, and that compensation under the act may lawfully be paid only in those cases in which a state has no authority to act. The phrase 'may not validly be provided by State law' obviously refers to the authority of a state to act and not to the inquiry as to whether a state has exercised its power. Congress intended to occupy only a portion of the field (the crews of ships being excepted) from which the states are excluded, and to abstain altogether from duplicating the work of the states in

the field which they are permitted to enter. Concurrent remedies in both state or federal proceedings are not available. It was the original policy of Congress to leave to the states, as far as possible, to provide compensation to workers for industrial accidents, and this policy has been continued in the present statute. It is noteworthy that by this course of action the requirements of uniformity in matters of admiralty and maritime jurisdiction is observed. *Southern Pacific Company v. Jensen,* 244 U.S. 205, 215, 216, 37 S.Ct. 524, 61 L.ed. 1086, L.R.A. 1918C, 451, Ann. Cas. 1917E, 900."

Markovich's Injury Did Not Occur on Navigable Waters

There is no conflict in the evidence that Marokvich was not injured on navigable waters. The testimony before the Deputy Commissioner conclusively established that Markovich fell to the shore or beach from the tug El Sol, which had been pulled on shore from the navigable waters of Tacoma Harbor and rested on the beach or shore, on the cradle of a marine railway (Tr. 35, 41). Markovich states he was amidships on the tug when he fell (Tr. 43). Markovich stepped on a loose board on the deck of the tug (Tr. 37). The tug El Sol was about 136 feet long and the cradle of the marine railway was about 150 feet long (Tr. 58). He fell to the beach below and in falling struck the staging (Tr. 37). Both the inception and culmination of his injury occurred on shore, to which the State Act applied.

Factually Markovich's act of falling from the tug to the beach was comparable to the injury to the shoreside stevedore in the case of *Smith v. Taylor & Son,*

276 U.S. 179, 72 L.ed. 520. The stevedore there was standing on a staging affixed to a dock and was knocked off the stage by the sling and drowned in the waters below. The employer attacked the assumption of jurisdiction by the Louisiana Compensation Act of the injury. In holding the injury occurred on land, the United States Supreme Court said:

> "The blow by the sling was what gave rise to the cause of action. It was given and took effect while the deceased was upon the land. It was the sole, immediate and proximate cause of his death. The substance and consummation of the occurrence which gave rise to the causes of action took place on land."

Conversely, where an off-shore stevedore was knocked by a swinging hoist to the wharf where he sustained injuries, the Supreme Court in the case of *Minnie v. Port Huron Terminal Co.,* 295 U.S. 647, 79 L.ed. 1631, held the Michigan Compensation Act inapplicable to the injury since it was consummated on navigable waters. See also *The Admiral Peoples, supra.*

Torts on Marine Railways Are Not Subject to Admiralty Jurisdiction

Because they have been withdrawn from navigable waters and rest on land and are not vessels, marine railways have been traditionally held not subject to admiralty jurisdiction for torts.

In The Professor Morse, 23 Fed. Rep. 803, a libel for alleged maritime tort for damage done a marine

railway by a vessel was disallowed on jurisdictional grounds. While a vessel was being hauled out of the water on a marine railroad, and the vessel's stern drawing three feet of water, the vessel suddenly keeled over. The court, after a minute description of the mechanism of a marine railway (similar to that of appellants), said:

> "From this description of the structure, it can hardly be doubted that it was not in any proper sense, a craft or vessel intended to float on the water. The upper end was securely fastened to the land — as much so as a wharf built out into the stream — and its character is not changed because the ways ran down below the ebb and flow of the tide, to facilitate the transfer of vessels from the water to the shore. The *Maud Webster,* 8 Ben. 547, was a stronger case for the libellants; but in that case Judge Blatchford, after argument and reargument, dismissed the libel for want of jurisdiction."

Marine Railways Are Not Drydocks Under Section 903

We assume that appellees will advance the generally discredited argument that a marine railway is a "dry dock" as that term is used in §903, *supra,* and contend that the synonomy of these terms would justify application of the Longshoremen's and Harbor Workers' Compensation Act to an injury received on a marine railway. This argument completely overlooks the jurisdictional provision of §903 *supra,* that the injury must occurr "on navigable waters of the United States" to be compensable under the Act.

Weight of Authority Establishes Rule Marine Railways Not Subject to Longshoremen's and Harbor Workers' Act

On the first occasion in which the question at bar was presented, United States District Judge Groaner in the Eastern District of Virginia held in the case of *Colonna's Shipyard v. Lowe* (Va.) 22 F.(2d) 843 (1927) that the provision of the Virginia State Compensation Act and not the Federal Law was applicable to an injury occurring to a workman on a marine railway which the Deputy Commissioner had classified as under Federal Law. The court said:

> "Applying these tests to the cases under consideration, it would seem to follow that since the employment related to work to be done on a completed structure, the contract was maritime in its nature; but, since the vessel and the railway on which she was drawn were both on high land, and the injury was sustained under those conditions, the tort was non-maritime for it has always been the rule that in cases of tort, different from cases of contract, the test of jurisdiction in the admiralty depends upon the place where the injury occurs and since, as has been remarked, the injury here was on dry land, it follows that the Virginia State Compensation Act is valid, and the federal law inapplicable."

In the case of *Norton v. Vesta Coal Company* (3 C.A.A.) 63 F.(2d) 165, the Third Circuit Court followed the *Colonna* case in an opinion written by Judge Buffington. The court said:

> "The controlling federal statute involved provides the term 'employer' means an employer any of whose employees are employed in maritime em-

ployment, in whole or in part, upon the navigable waters of the United States (including any dry dock), and the contention is that Congress meant to include in the term 'dry dock' a marine railway. We cannot make such assumption or speculation.

"We know clearly what in common speech a dry dock is. We also know what, in common speech, a marine railway is. In this regard see *The Professor Morse* (D.C.) 23 F. 803. While they are used for a like purpose, it by no means follows they are interchangeable terms. A contract to build, or rent, a dry dock would not be fulfilled in building a marine railway, and conversely, a contract to rent, or build, a marine railway would not be fulfilled by a dry dock. With these terms describing two different structures, it seems clear that, when Congress used the word 'dry dock,' it meant a dry dock in the common acceptation of the term, and did not intend to include any other thing. We rest on firm ground when we take Congress at its word. We enter into a field of speculation when we impute to Congress an intent to include something it did not say it included. The mention of one of a class is the exclusion of others. So regarding, the judgment below is affirmed."

The Government took an appeal from this decision to the Supreme Court of the United States. On January 15, 1934, the United States Supreme Court in a per curiam decision, reported in 290 U.S. 613, 78 L.ed. 536, made the following order:

"per curiam as it appears that the government has now adopted the conclusion that the decision below is correct and no substantial controversy is presented at the bar of this court the writ of certiorari herein is dismissed."

In view of this legal acquiescence in the correctness of the rule of the *Norton* case by the Government, we are utterly at a loss to understand the ruling of the Deputy Commissioner in the present instance.

It is true that the Fifth Circuit in the cases of *Continental Casualty Company v. Lawson,* 64 F.(2d) 802 and *Maryland Casualty Company v. Lawson,* 101 F.(2d) 732, dissent from the rule of law officially promulgated by the United States Supreme Court in the *Norton* case, *supra.* These cases proceed on the erroneous assumption that a marine railway is embraced in the phrase "drydock" as used in §3(a) of the Act. This is likewise the contention of the Deputy Commissioner in the instant case.

A short answer to this obviously incorrect interpretation of the term "drydock" is found in the *Norton* case, *supra.*

The court will take judicial notice that the function, structure and locality of a marine railway are entirely dissimilar from those of a dry dock. The obvious reason why Congress did not attempt to include marine railways within the reach of the Act was that it did not have the constitutional power to do so because of the location of marine railways on land.

The obvious differences between a marine railway and a drydock can be easily discerned by a study of the dictionary definitions of these two utterly dissimilar types of structures.

In the International Maritime Dictionary (1948) they are defined as follows:

"Marine Railway. An inclined plane situated on the embankment of a river or in a harbor and equipped with tracks, cradle and winding machinery and on which vessels are hauled up for bottom cleaning and repairs. Also called slipway, or patent slip. Marine railways are built parallel or perpendicular to the embankment, the ships being hauled up sideways or end on as the case may be. The declivity varies from 1/15 to 1/25. Marine railways are generally used for small and medium size vessels the maximum being around 5,000 tons displacement."

"Dry Dock." An enclosed basin into which a ship is taken for underwater cleaning and repairing. It is fitted with watertight entrance gates which when closed permit the dock to be pumped dry. In modern dry docks the gates opening in the middle and hinged at sides have been replaced by a caisson or pontoon that fits closely into the entrance. The caisson is flooded and sunk in place, and can be pumped out, floated and warped away from the dock entrance to permit passage of vessels. Also called graving dock, graving dry dock."

Similarly in a Glossary of Sea Terms (1927), their essential dissimilarities are again emphasized.

"Marine Railway. Railway is an inclined structure at the water's edge which extends below the water. It carries a cradle which moves on rollers or wheels. The cradle run below the water receives the vessel, usually at high water, which is then hauled out by steam or electric power."

"Dry Dock, a water-tight basin which after pumping out excludes the water and allows examination and work upon the bottom of a vessel. Vessels are floated in and out through the remov-

al of a bulkhead called a caisson, itself capable of floating or flooding. A floating dock receives a vessel when it is submerged to a proper depth, after which the water-tight compartments of the dock are pumped out and the buoyancy of the dock raises the vessel. A graving dock, usually walled with stone, was one in which vessels' bottoms were formerly cleaned by a burning process called graving or greaving, but the term still applies to the walled up excavated docks seen in Navy Yards. They are more substantial and permanent than floating docks, but are far more costly. There are screw docks comprising a platform which submerges to receive a vessel, the whole being raised by screws or jacks."

Marine Railways Covered by Washington State Compensation Act

Washington being an important maritime state with a large shipbuilding industry, has been long confronted with the application of its Compensation Act both to on-shore and off-shore workers. Its legislature by Chapter 79, Laws of 1931 passed Rem. Rev. Stat. §7693-a, of the State Compensation Act reading as follows:

> "The provisions of this act shall apply to all employers and workmen, except a master or member of a crew of any vessel, engaged in maritime occupations for whom no right or obligation exists under the maritime laws for personal injuries or death of such workmen."

All shipbuilding operations are declared to be extra-hazardous under §7674 of the Washington State Compensation Act. By §7676, Rem. Rev. Stat., all ship-

building operations have been placed in class 9 of the Washington Compensation Act for premium classification purposes.

> "Class 9-1 Boatbuilding 'steel hulls' shipbuilding 'steel hulls' (includes all operations within shipyards).
>
> "Class 9-2 Boatbuilding 'wooden hulls' shipbuilding, 'wooden hulls' (includes all operations within shipyards)."

By §7673, Rem. Rev. Stat., the Workmen's Compensation Act is made the exclusive remedy for all industrial injuries occurring in the State of Washington.

In 1937 (ten years after the passage of the Longshoremen's and Harbor Workers' Compensation Act) the Washington Supreme Court was confronted with the question of whether a worker injured on a marine railway was entitled to coverage under the Washington Act. It ruled he was in the case of *Rohlfs v. Dept. of Labor & Industries,* 190 Wash. 566, 69 P.(2d) 817, following the current weight of authority. The court said in part:

> "A marine railway, such as that upon which the 'Floyd' was raised, runs from some distance in the water to any desired point on dry land. It is not like a floating dock or a dry dock, into which a vessel which needs repair floats on the surface of the water. Upon a marine railway, the boat is hauled by some power other than its own and not connected with navigation, out of the water and to a point upon the land, where the boat remains until its future is determined by its owner. It may return to its native element, or it may be destroyed,

with or without the intention to terminate its career as a vessel. As above stated, it is the law that the same workman, while working alternately on a dock and on a ship attached thereto, varies the nature of his employment as he passes from the dock to the ship and back again. While on the ship he is within the maritime jurisdiction; while on the dock, he is under the jurisdiction of the state law.

"Respondent was working on land, not on the water; the labor which he was performing was, in the language of this court in the case of *Puget Sound Bridge & Dredging Co. v. Department of Labor & Industries,* 185 Wash. 349, 54 P.(2d) 1003, *supra,* quoting from *Dewey Fish Co. v. Department of Labor & Industries, supra,* 'a matter of purely local concern, unconnected with navigation,' and was essentially non-maritime in its nature.

"Careful consideration of the problem here presented convinces us that the trial court correctly held that, while working on the 'Floyd,' respondent was engaged in a non-maritime employment, and was within the protection of the state workmen's compensation act.

"This conclusion is supported by the following authorities, in addition to those above cited: *State Industrial Commission v. Nordenholt Corp.,* 259 U.S. 263, 42 S.Ct. 473, 25 A.L.R. 1013; *Smith & Son v. Taylor,* 276 U.S. 179, 48 S. Ct. 228; *Colonna's Shipyard v. Lowe,* 22 F.(2d) 843; *Norton v. Vesta Coal Co.,* 63 F.(2d) 165.

"The trial court correctly ruled that respondent, at the time he was injured, was within the protection of the workmen's compensation act of this

state, and the judgment appealed from is accordingly affirmed."

A similar result had previously been reached in the case of *Giske v. Autrem,* by the Superior Court of King County, Wash., 1931 American Maritime Case, p. 1200.

As a result of these decisions, the large number of small shipbuilding plants operating in the state of Washington have regularly reported their premiums on marine railways to the State fund, which has compensated employees injured thereon. No challenge to the jurisdiction of the Washington Act to cover this type of employment has been made until the present case.

Injuries on Marine Railways Are Matters of Local Concern

Conceding, *arguendo,* that Markovich's injuries occurred "on navigable waters of the United States," since the marine railway was withdrawn from navigable waters and resting on the shore, his employment and injuries were purely matters of local concern (see *Rohlfs v. Dept. of Labor & Industries, supra*) and unconnected with navigation and essentially non-maritime in character, to which the Washington Compensation Act applied, under the following decisions:

Millers Underwriters v. Braud, supra;

Sultan Ry. and Timber Co. v. Dept. of Labor & Industries, 277 U.S. 135, 72 L.ed. 820;

Grant Smith Porter Shipbuilding Co. v. Rhode, 257 U.S. 461, 66 L.ed. 321;

Rosengrant v. Harvard, 273 U.S. 664, 71 L.ed 829.

The facts in the case at bar are strikingly similar to those in the case of *Alaska Packers Association v. Industrial Accident Commission of the State of California,* 276 U.S. 467, 72 L.ed. 656. There a fisherman was injured while pushing a stranded boat into navigable waters. In permitting the State Compensation Act to apply, the Supreme Court said:

> "Whether in any possible view, the circumstances disclose a cause within the admiralty jurisdiction we need not stop to determine. Even if an affirmative answer be assumed, the petitioner must fail. Peterson was not employed merely to work on the bark or the fishing boat. He also undertook to perform services as directed on land in connection with the canning operations. When injured certainly he was not engaged in any work so directly connected with navigation and commerce that to permit the rights of the parties to be controlled by the local law would interfere with the essential uniformity of the general maritime law. The work was really local in character."

Markovich's Injuries in "Twilight Zone" of Conflicting Jurisdictions

The doctrine of *Davis v. Department of Labor & Industries,* 317 U.S. 249, 87 L.ed. 246 and its subsequent amplification by the United States Supreme Court compels reversal of this case.

There the State of Washington had declined to assume jurisdiction of a death claim to a workman who drowned on a barge while assisting in the loading

thereon of scrap iron from a bridge which was in the process of being dismantled. The Washington Supreme Court (12 Wn.(2d) 349, 121 P.(2d) 365) held the workman's death occurring on navigable waters while loading a barge to be exclusively in admiralty jurisdiction and the State Act did not apply. This holding was reversed by the United States Supreme Court, in a decision which gave birth to the "twilight zone" doctrine of conflicting compensations jurisdictions between the State Acts and the Longshoremen's and Harbor Workers' Act. Justice Black said:

> "There is, in the light of the cases referred to, clearly a twilight zone in which employees must have their rights determined case by case and in which particular facts and circumstances are vital elements. That zone includes persons, such as decedent, who are as a matter of actual administration protected under the state compensation act."

The Supreme Court held that Rem. Rev. Stat. §7674 and §7693(a), *supra* could be applied to decedent's death without any constitutional objection, saying:

> "Under all circumstances of this case we will rely on the presumption of constitutionality in favor of this state enactment; for any contrary decision results in our holding the Washington Act unconstitutional as applied to this petitioner. * * * Granting the full weight of the presumption, and resolving all doubts in favor of the Act, we hold the Constitution is no obstacle to petitioner's recovery."

In an effort to eliminate the uncertainties and complexities of conflicting compensation jurisdictions, the United States Supreme Court has greatly broadened

the rule of the *Davis* case, *supra,* and permitted application of state compensation acts to injuries occurring on navigable waters to workmen working on completed vessels in circumstances which were previously held to be committed to the exclusive maritime jurisdiction and beyond the reach of State Acts, where the State first assumed juridiction.

In the case of *Baskin v. Industrial Accident Commission,* 201 P.(2d) 549, the injured workman was injured while attempting to free a crane which had been fouled on the vessel and fell down the hold. He filed a claim for compensation under the California Compensation Act which was denied for the reason that the workman, while engaged in repairing a completed ship lying in navigable waters and fitting her for stowage of cargo, was engaged in a task which had an intimate connection with commerce and the State Workmen's Compensation Act could not be applied. This case was reversed on the authority of the *Davis* case, *supra,* at 338 U.S. 584, 94 L.ed. 523.

In a re-trial of the case (217 Pac.(2d) 733) the California Court followed the *Davis* case and applied the California Compensation Act against the employer's contention that the Longshoremen's and Harbor Workers' Act was applicable. This decision was again affirmed by the Supreme Court of the United States in 338 U.S. 584, 94 L.ed. 523.

In *Moore's* case, 323 Mass. 462, 80 N.E.(2d) 478 (1948), the application of the Massachusetts Workmen's Compensation Act to a rigger employed on a vessel on a floating drydock was sustained.

In discussing the scope of the *Davis* decision, the Supreme Court of Massachusetts said:

> "But the situation was definitely altered by the decision of the Supreme Court of the United States in *Davis v. Department of Labor and Industries of Washington,* 317 U.S. 249, 63 S.Ct. 225, 87 L.ed. 246, written by Mr. Justice Black in 1942. That was not a case of repairs upon a previously completed vessel. It was a case where the employee fell from a barge where he was examining steel that he had just helped to cut from a bridge which was in process of being dismantled.
>
> "The significance of the case, however, lies in its obvious attempt to set up a means of escape from the difficulties involved in drawing the line between State and Federal Authority under the doctrine of the Jensen case. The Davis case recognizes a presumptive quality in the decisions of Federal authorities under the Longshoremen's and Harbor Workers' Act and a presumption of constitutionality of the State acts as applied to particular cases. The decision does not overrule the Jensen case. It does, however, at least as appraised by Mr. Justice Frankfurter, who concurred in it, and Chief Justice Stone, who dissented from it, create a 'twilight zone' or an area of doubt within which the two acts overlap and the injured workman may recover under either of them. It would seem, therefore, that although apparently some heed must still be paid to the line between State and Federal authority as laid down in the cases following the Jensen case, the most important question has now become the fixing of the boundaries of the new 'twilight zone,' and for this the case gives us no rule or test other than the in-

definable and subjective test of doubt. Mr. Justice Frankfurter says that 'Theoretic illogic is inevitable so long as the employee * * * permitted to recover' at his choice under either act. 317 U.S. at page 259, 63 S.Ct. at page 230. Probably therefore our proper course is not to attempt to reason the matter through and to reconcile previous authorities, or to preserve fine lines of distinction, but rather simply to recognize the futility of attempting to reason logically about 'illogic,' and to regard the Davis case as intended to be a revolutionary decision deemed necessary to escape an intolerable situation and as designed to include within a wide circle of doubt all water front cases involving aspects pertaining both to the land and to the sea where a reasonable argument can be made either way, even though a careful examination of numerous previous decisions might disclose an apparent weight of authority one way or the other. We can see no other manner in which the Davis case can be given the effect that we must suppose the court intended it should have, and we must assume that the court intends to follow that case in the future.

"We are the more inclined to include within the twilight zone the case of a workman engaged in an ordinary land occupation although occasionally going upon a dry dock or vessel to make repairs because in the latest case of that particular type decided in the Supreme Court of the United States, *John Baizley Iron Works v. Span,* 281, U.S. 222, 50 S.Ct. 306, 74 L.ed. 819, although the case was held to be one exclusively of Federal cognizance, three of the justices dissented, and Mr. Justice Black in his opinion in the Davis case re-

fers to the *Baizley Iron Works* case as if it were one of those responsible for the existing confusion. Moreover, the distinction between working on navigable water in repairing a previously completed vessel and doing precisely the same work on navigable water upon a vessel in process of construction may be thought a narrow one of doubtful practical validity.

"For the reasons stated we are of the opinion that the case now comes within the Workmen's Compensation Law of this Commonwealth. The Supreme Court of Texas in *Emmons v. Pacific Indemnity Co.,* 208 S.W.2d 884, sustained State jurisdiction in a very similar case in part for similar reasons. The Court of Errors and Appeals of New Jersey in *DeGraw v. Todd Shipyards Co.,* 134 N.J. L. 315, 47 A2d, 338, upheld the State jurisdiction in a similar case, but without citing the *Davis* case. The Supreme Court of the United States denied certiorari sum nomine *Todd Shipyards Corporation v. DeGraw,* 329 U.S. 759, 67 S.Ct. 113, 91 L.ed. 655."

State Compensation Awards to Markovich Not Voluntary

The lower court declined to apply the rule of the *Davis* case to the case at bar for the reason

"that the payments from the state were voluntary and without an award of compensation under the Workmen's Compensation Act of said state * * * (Tr. 24)."

The lower court completely misconstrued the exclusive features of the Washington Workmen's Compensation Act which is compulsory and monopolistic in character and misread the certified copy of Marko-

vich's claim filed with the Department of Labor & Industries (Employer's Exhibit 4).

Rem. Rev. Stat. §7679 provides in part:

> "Each workman who shall thereafter be injured in the course of his employment, or his family or dependents in case of death of the workman, shall receive out of the accident fund, compensation, in accordance with the following schedule, and, except as in this Act otherwise provided, such payment shall be in lieu of any and all rights of action whatsoever against any person whomsoever * * *"

This paragraph is followed by a lengthy compensation schedule of awards for varying classifications of injuries. It prescribed a monthly compensation rate of $75.00 so long as Markovich should be totally temporarily disabled.

Rem. Rev. Stat. §7686 provides in part:

> "(a) Where a workman is entitled to compensation under this act, he shall file with the Department, his application for such, together with the certificate of the physician who attended him * * *"

In accordance with these statutory provisions, Markovich filed his claim and application for compensation with the Washington Department of Labor & Industries shortly after his accident, supported by the certificate of his doctor that he would be disabled for one year by this accident. His employer, Western Boat Building Company, stated in its report it had paid premiums on Markovich to the State Fund in Class 9-2 and did not oppose the allowance of the claim by the Department. The Department after first indicating acceptance of the claim (Tr. 63) reinvesti-

gated the same and on December 14, 1950, formally allowed the claim and made its initial award to Markovich in the amount of $75.00. Formal Findings of Fact determining Markovich was under the State Act were entered (Employer's Exhibit 4). Thereafter on December 20, 1950, and January 24, 1951, two awards of compensation were made to Markovich in like amount.

The Washington Act contemplates that where the Department initially allows a claim, the compensation payments thereafter are made automatically. Only if the Department refused compensation, or denied a workman claimed relief under the Act, would an administrative hearing be held as provided by Rem. Rev. Stat. §7697.

In the case of *Kidder v. Marysville & Arlington R. Co.,* 160 Wash. 471 (Rehearing) p. 472, 295 Pac. 162, 170, a widow filed her claim for compensation and received the statutory benefits. She then sought to sue her deceased husband's employer under the Federal Employers' Liability Act. In considering the status of the departmental findings of fact the widow was under the State Act the court said:

> "The appropriate division of the department of labor and industries had the power to make a finding of fact, first, as to the classification of the logging railroad; and second, as to the rights of respondent under her claim for compensation. Such findings in proper cases become binding upon all parties concerned. 34 C.J. 878, §1287; L.R.A. 1916A 266."

By filing for and accepting compensation, the widow

was held estopped to sue. The decision by the Department that Markovich was entitled to compensation under the State Act was binding on Markovich, his employer and the State.

> "Since the department is the original and sole tribunal with power to so determine the facts; and its findings are reviewable only on appeal, it must follow that a judgment by it, resting upon a finding of fact * * * is final and conclusive upon the department and upon the claimant, unless set aside on an appeal authorized by statute * * * *Abraham v. Department of Labor & Industries,* 128 Wash. 160."

We submit that by filing his claim for compensation under the Washington Act and invoking State relief and the entry by the Department of Labor & Industries of findings of fact and order awarding Markovich compensation, he is estopped from seeking compensation elsewhere. *Kidder v. Marysville & Arlington R., supra.*

Washington Act Provides Markovich's Exclusive Remedy

By §7673 of Rem. Rev. Stat. the Washington Act provided Markovich's exclusive remedy for compensation. It reads as follows:

> "The common law system governing the remedy of workmen against employers for injuries received in hazardous work is inconsistent with modern industrial conditions. In practice it proves to be economically unwise and unfair. Its administration has produced the result that little of the cost of the employer has reached the workman

and that little only at large expense to the public. The remedy of the workman has been uncertain, slow and inadequate. Injuries in such works, formerly occasional, have become frequent and inevitable. The welfare of the state depends upon its industries, and even more upon the welfare of its wage-worker. The State of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workmen, injured in extra-hazardous work, and their families and dependents is hereby provided regardless of questions of fault *and to the exclusion of every other remedy, proceeding or compensation,* except as otherwise provided in this act; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdictions of the courts of the state over such causes are hereby abolished, except as in this act provided." (Italics ours.)

In *Magnolia Petroleum v. Hunt,* 320 U.S. 430, 88 L.ed. 149, the Texas Compensation Act was likewise made the exclusive remedy. After obtaining compensation from Texas, the claimant filed under the Louisiana Act. His claim was denied by the Supreme Court upon the grounds that the full faith and credit clause of the Constitution applied to the compensation order of Texas and prohibited such double filing since by statute the Texas award was exclusive.

The court said:

"And we can perceive no tenable ground for saying that a compensation award need not be given the same effect as res judicata in another state as it has in the state where rendered. Such was the

decision of this court in *Chicago, R.I. & P.R. Co. v. Schendel,* 270 U.S. 611, 70 L.ed. 757, 46 S.Ct. 420, 53 A.L.R. 1265, 26 N.C.C.A. 971, *supra,* in which recovery of an award for compensation under the Iowa Workmen's Compensation Act was held to bar recovery in a suit against the employer in Minnesota to recover for the same injury under the Federal Employers' Liability Act. Both states had, as in this case, allowed recovery as they were free to do but for the full faith and credit clause. This court held that the employee, having had his remedy by the judgment in Iowa, was precluded by the full faith and credit clause from pursuing a remedy for his injury in another state. The remedies afforded to respondent by the Texas and Louisiana Workmen's Compensation Laws are likewise rendered mutually exclusive by the Texas judgment and the full faith and credit clause. The Texas award, being a bar to any further recovery of compensation for respondent's injury, is, by virtue of the full faith and credit clause, exclusive of his remedy under the Louisiana Act.

"It lends no support to the decision of the Louisiana court in this case to say that Louisiana has chosen to be more generous with an employee than Texas has. Indeed, no constitutional question would be presented if Louisiana chose to be generous to the employee out of the general funds in its Treasury. But here it is petitioner who is required to provide further payments to respondent, contrary to the terms of the Texas award, which, if the full faith and credit clause is to be given any effect, was a conclusive determination between the parties that petitioner should be liable for no more

than the amount of the Texas award. For this reason it is not enough to say that a practical reconciliation of the interests of Texas and Louisiana has been effected by the Louisiana court. There has been no reconciliation of the liability established by the Louisiana judgment with the rights conferred on petitioner by the Texas award and the full faith and credit clause."

Lower Court Erred in Failing to Accord De Novo Hearing on Jurisdictional Question of Place of Injury

The lower court denied a de novo review of the question of whether Markovich was injured on navigable waters. This was plainly erroneous.

This is a jurisdictional issue under the case of *Crowell v. Benson,* 285 U.S. 22 76 L.ed. 598, which the district court must decide anew.

Chief Justice Hughes said:

"Assuming that the Federal court may determine for itself the existence of these fundamental or jurisdictional facts, we come to the question,—Upon what record is the determination to be made? There is no provision of the statute which seeks to confine the court in such a case to the record before the deputy commissioner or to the evidence which he has taken. The remedy which the statute makes available is not by an appeal or by a writ of certiorari for a review of his determination upon the record before him. The remedy is 'through injunction proceedings, mandatory or otherwise.' Sec. 21 (b). The question in the instant case is not whether the deputy commissioner has acted improperly or arbitrarily as shown by the record of his proceedings in the course of ad-

ministration in cases contemplated by the statute, but whether he has acted in a case to which the statute is inapplicable. By providing for injunction proceedings, the Congress evidently contemplated a suit as in equity, and in such a suit the complainant would have full opportunity to plead and prove either that the injury did not occur upon the navigable waters of the United States or that the relation of master and servant did not exist, and hence that the case lay outside the purview of the statute. As the question is one of the constitutional authority of the deputy commissioner as an administrative agency, the court is under no obligation to give weight to his proceedings pending the determination of that question. If the court finds that the facts existed which gave the deputy commissioner jurisdiction to pass upon the claim for compensation, the injunction will be denied insofar as these fundamental questions are concerned; if, on the contrary, the court is satisfied that the deputy commissioner had no jurisdiction of the proceedings before him, that determination will deprive them of their effectiveness for any purpose. We think that the essential independence of the exercise of the judicial power of the United States in the enforcement of constitutional rights requires that the Federal court should determine such an issue upon its own record and the facts elicited before it."

CONCLUSIONS

Since neither the findings and order of the Deputy Commissioner nor the order of the district court are in accordance with law or supported by evidence, both should be reversed in accordance with the rule promulgated in *Cardillo v. Liberty Mutual Insurance Co.*, 330 U.S. 469, 91 L.ed. 1028, and the State of Washington permitted to compensate Markovich in accordance with its Compensation Act.

Particularly is such judicial action demanded in order to put an end to the growing practice of compensation shopping by injured workmen and to give needed finality to administrative orders of State Compensation Boards and likewise to prevent unseemly conflicts between state and federal jurisdictions.

Respectfully submitted,

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